Filed 9/30/03 In re Maria C. CA11/4

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

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| In re MARIA C., a Person Coming Under the Juvenile Court Law. | |
| ALAMEDA COUNTY SOCIAL SERVICES AGENCY,<br>Plaintiff and Respondent,<br>v.<br>EDWIN C.,<br>Defendant and Appellant. | A100908<br><br>(Alameda County Super. Ct. No. 184392) |

Appellant Edwin C. is the father of minor Maria C. The minor was removed from appellant's care after social services workers concluded that appellant was committing improper sexual acts upon her. After appellant admitted the allegation of the dependency petition that he had improper sexual contact with his daughter, she was declared a ward of the juvenile court and placed in foster care.

By the time the six-month review hearing was held in August 2002, appellant was in prison, scheduled for release in July of 2003. At the start of the hearing, at which appellant was present, counsel for the minor advised the court that the minor would like visitation with appellant in prison. This matter was not resolved at the hearing, the court deferring a decision until it had further information about the minor's stability and her

ability to cope with seeing appellant in the prison setting. The court ordered further reunification services and scheduled a further hearing for October 17, 2002 "on the recommendation from the therapist regarding visitation."

At the October 17 hearing, the court was advised that appellant "has been transferred from San Quentin to a facility in Los Angeles," and that the minor had recently changed therapists. The hearing was continued to the following month to secure appellant's attendance and to give the minor an opportunity to establish a bond with her new therapist.

Prior to the November hearing, the court received a recommendation from the social worker that visitation between appellant and his daughter "commence when it is determined to be clinically appropriate for those visits to occur by Maria's therapist." Attached to the social worker's recommendation was a letter from the minor's new therapist, who advised that "Maria . . . continue with weekly individual therapy" at the therapist's clinic. At the start of the hearing, the court stated that "The recommendation from the therapist is that visits not occur yet because the minor is not emotionally ready for those visits." Although the minor and her counsel agreed with this recommendation, appellant did not. His counsel stated that appellant desired "a contested hearing" because he was "in disagreement with the recommendation." The court responded: "I think what will probably have to happen is that a [section] 388 petition should be filed because the previous order was no visitation. I think a 388 petition would need to be filed in order to change that order . . . . [¶] I will order the filing of a 388 petition for a contested hearing on the issue of visitation." Asked by the court for her opinion, counsel for the minor stated that "the Court's direction . . . is appropriate" and "what would be legally required." Appellant filed a timely notice of appeal, contending only that the juvenile court erred in denying him a contested hearing on the visitation issue.

Welfare and Institutions Code section 388, the statute invoked by the juvenile court, provides: "Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself or herself through a properly appointed guardian may, upon grounds of change of circumstance or new evidence,

petition the court in the same action in which the child was found to be a dependent child of the juvenile court or in which a guardianship was ordered pursuant to Section 360 for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court." (Welf. & Inst. Code, § 388, subd. (a); subsequent statutory references are to this Code.) "If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given . . . ." (*Id*., subd. (c).) California Rules of Court, rule 1432, augments section 388 and covers much of the same ground. The rule specifies that the petition shall include, among other things, concise statements as to "any change of circumstance or new evidence that requires changing the order" and "the proposed change of the order." (Cal. Rules of Court, rule 1432(a)(6) & (7).)

In practice, section 388 and California Rules of Court, rule 1432 require the person desiring the change of an order to make a prima facie showing of a change in circumstances and why modifying the existing order would be in the juvenile's best interests. If the petition does not establish the prima facie showing, it may be denied without a hearing. (Rule 1432(b); *In re Anthony W*. (2001) 87 Cal.App.4th 246, 250; *In re Zachary G*. (1999) 77 Cal.App.4th 799, 806-807.) Whether to require the hearing is a matter confided to the juvenile court's discretion. (*In re Jasmon O*. (1994) 8 Cal.4th 398, 415; *In re Aljamie D*. (2000) 84 Cal.App.4th 424, 431.) The obvious prerequisite for commencing this process is a written petition. (*Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067, 1077.) The petition is important because it provides notice to all concerned of what subjects may be at issue, and triggers section 388's due process procedural safeguards. (*In re Marilyn H*. (1993) 5 Cal.4th 295, 309; *In re Lance V*. (2001) 90 Cal.App.4th 668, 676.) "Successful petitions have included declarations or other attachments which demonstrate the showing the petitioner will make at a hearing . . . ." (*In re Anthony W*., *supra*, at p. 250.)

Appellant argues that "Status review hearings where a child has been placed in-home, i.e., with one or both parents, are held pursuant to section 364. There, the only

issue of which the parties have notice is whether continued supervision by the juvenile court is necessary. In such cases, the court properly may require a party seeking modification of a visitation order to file a section 388 petition so that any party that wants to oppose the modification is able to prepare its case. (*In re Natasha A*. (1996) 42 Cal.App.4th 28, 34-35.) Where, as here, the child has been placed out-of-home, and the status review hearing therefore is held pursuant to section 366.21, the parties have sufficient notice that the court may modify its prior orders, and the juvenile court has the statutory authority to modify orders concerning reunification services, including visitation, without a section 388 petition having been filed. (*Ibid*.)"

In the decision cited by appellant, *In re Natasha A*., *supra*, 42 Cal.App.4th 28, the juvenile court denied an oral request for visitation made at an 18-month review hearing by the father of a molested child whose custody had been given to the mother. When the father appealed, the social services agency argued that "the only way [the father] could obtain a change in visitation was by filing a petition under section 388. We agree." (*Id*. at p. 34, fn. omitted.) The court continued: "The juvenile court is forbidden to change, modify, or set aside its previous orders without advance notice to the minor and to DPSS. (§ 386.) If the minor has been removed from his or her parent's physical custody, the juvenile court must hold periodic review hearings pursuant to section 366.21. At such hearings, the court has the statutory power to order that reunification services, including visitation, be offered, modified, continued, or, under narrowly limited circumstances, terminated. (§ 366.21, subds. (e), (f), (g)(1), (g)(3), (h).) *Arguably, these statutory provisions constitute sufficient notice that the juvenile court may modify its previous orders at a section 366.21 review hearing*. [¶] If, as here, the minor is not removed from his or her parent's physical custody, the juvenile court still must hold periodic review hearings; however, those hearings are governed by section 364. Under section 364, the only issue before the court is 'whether continued supervision is necessary.' Absent a section 388 petition (or some other form of prior notice), it cannot modify its previous orders at a section 364 review hearing." (*Id*. at pp. 34-35, italics added & fn. omitted.)

Based on the italicized sentence (which respondent treats as dicta), appellant argues that because visitation is always at issue in review hearings, he could not be required to file a section 388 petition to change the existing visitation order. This reasoning is not persuasive. Even conceding the premise of *Natasha A*.—that visitation in a review hearing is always subject to change at the court's initiative, thus the parties are always on notice—it does not follow that a party is relieved of the obligation to give notice when the party, not the court, seeks modification of an existing visitation order. It would also be contrary to considerable authority concerning the dependency system and the role of section 388 in that system.

"Dependency proceedings are proceedings of an ongoing nature. While different hearings within the dependency process have different standards and purposes, they are part of an overall process and ongoing case. One section of the dependency law may not be considered in a vacuum. It must be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect." (*In re Marilyn H*., *supra*, 5 Cal.4th 295, 307.) "The petition pursuant to section 388 lies to change or set aside *any* order of the juvenile court in the action *from the time the child is made a dependent child of the juvenile court* . . . ." (*In re Jasmon O*., *supra*, 8 Cal.4th 398, 415, italics added.) "Section 388 plays a vital role in the statutory scheme by allowing the juvenile court to modify existing orders in response to new evidence and changed circumstances." (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 879; accord, *In re Lance V*., *supra*, 90 Cal.App.4th 668, 676; *In re Kimberly F*. (1997) 56 Cal.App.4th 519, 528-529.) Obviously, if the changed circumstances pertain to those of a parent, and because it is the parent who would be best situated to demonstrate the change, the parent may, using a petition authorized by section 388, give notice to the court and other parties that a change in an existing order will be sought for a specific reason and for a specific modification.

Appellant's oral request for a contested hearing could not take the place of a written petition. Nothing in the request came close to making the required prima facie showing, alerting the court and other parties as to what issues might be controverted at a

hearing, what evidence would be produced, and what changes in the existing order would be sought. The summary denial of appellant's request was therefore not an abuse of discretion. (*In re Jasmon O.*, *supra*, 8 Cal.4th 398, 415; *In re Anthony W.*, *supra*, 87 Cal.App.4th 246, 250.) We note that nothing in the court's order precluded appellant from thereafter renewing his request in the proper form.

The order is affirmed.

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Kay, P.J.

We concur:

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Reardon, J.

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Sepulveda, J.